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No. 564

Supreme Court of the United States

OCTOBER TERM, 1968

CONFEDERATION LIFE ASSOCIATION, a Canadian corporation, *Petitioner*,

v.

MANUEL ANTONIO VEGA y ARMINAN, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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September 25, 1968

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
1. Violation of International Law	8
2. Interference in the Conduct of Foreign Relations	13
3. Deprivation of Property Without Due Process	14
Conclusion	15

CITATIONS

Cases:

Aetna Life Ins. Co. v. *Dunken*, 266 U.S. 389	15
Allgeyer v. *Louisiana*, 165 U.S. 578	15
Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398	11-12
Clark v. *Allen*, 331 U.S. 503	13
Clay v. *Sun Ins. Office, Ltd.*, 363 U.S. 207	15
Clay v. *Sun Ins. Office, Ltd.*, 377 U.S. 179	15
Confederation Life Ass'n v. *Ugalde*, 164 So.2d 1 (Fla. 1964), *cert. denied*, 379 U.S. 915	7
Deutsche Bank Filiale Nurnberg v. *Humphrey*, 272 U.S. 517	15
Dougherty v. *Equitable Life Assur. Soc'y and 25 Other Cases*, 266 N.Y. 71, 193 N.E. 897 (1934)	8
Hartford Accident & Indem. Co. v. *Delta & Pine Land Co.*, 292 U.S. 143	15
Home Ins. Co. v. *Dick*, 281 U.S. 397	8, 15
International Shoe Co. v. *Washington*, 326 U.S. 310	15
Lauritzen v. *Larsen*, 345 U.S. 571	10, 11, 15
McGee v. *International Life Ins. Co.*, 355 U.S. 220	15
New York Life Ins. Co. v. *Dodge*, 246 U.S. 357	15
New York Life Ins. Co. v. *Head*, 234 U.S. 149	15
Norman v. *Baltimore & Ohio R.R.*, 294 U.S. 240	8
Present v. *United States Life Ins. Co.*, 96 N.J. Super. 285, 232 A.2d 863 (1967), *aff'd*, 51 N.J. 407, 241 A.2d 237 (1968)	7
Romero v. *International Terminal Operating Co.*, 358 U.S. 354	11
Secombe v. *Steele*, 61 U.S. (20 How.) 94	7
Société Internationale v. *Rogers*, 357 U.S. 197	15

Page

The Alsop Claim (United States v. *Chile)*, submitted under Protocol of 1909, 5 Am. J. Int'l L. 1079 (1911) 9, 10
Varas v. *Crown Life Ins. Co.*, 204 Pa. Super. 176, 203 A.2d 505 (1964), *cert. denied*, 382 U.S. 827 7-8
Watson v. *Employers Liab. Assur. Corp.*, 348 U.S. 66 15
Zimmermann v. *Sutherland*, 274 U.S. 253 15
Zschernig v. *Miller*, 389 U.S. 429 ..... 13, 14

Constitutional Provisions:

U.S. Constitution, Amend. XIV 2, 7, 14, 15
28 U.S.C. § 1257(3) 2

Statutes:

Cuban Law No. 568 of October 2, 1959 4
Cuban Law No. 930 of February 23, 1961 4

Miscellaneous:

Beckett, *What Is Private International Law?*, 7 Brit. Y.B. Int'l L. 73 (1926) 9
Brierly, *The Law of Nations* (4th ed. 1953) 9
Briggs, *The Law of Nations* (1952) 9
Freeman, *International Responsibility of States for Denial of Justice* (1938) 12
5 Hackworth, *Digest of International Law* (1943) 9, 11
League of Nations Doc. No. 1929 V. 10 9
League of Nations Doc. No. 1930 V. 17 9
Restatement, The Foreign Relations Law of the United States
§ 19 (1965) 9
§ 170 (1965) 11
§ 185 (1965) 12
Proposed Official Draft, 1962 9
Stevenson, *The Relationship of Private International Law to Public International Law*, 52 Col. L. Rev. 561 (1952) 9

Supreme Court of the United States

OCTOBER TERM, 1968

No.

CONFEDERATION LIFE ASSOCIATION, a Canadian corporation, *Petitioner,*

v.

MANUEL ANTONIO VEGA Y ARMINAN, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, Confederation Life Association, prays that a writ of certiorari issue to review a judgment of the Supreme Court of Florida. Without such a review there will stand a denial of justice by reason of the refusal of that court to respect or even take notice of the rights of Petitioner under international law and the Constitution of the United States.

OPINIONS BELOW

The opinion of the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida, is not reported. That opinion appears in the Appendix hereto beginning at page 1a. The opinion of the Third District Court of Appeal of Florida, which affirmed the judgment of the Circuit Court and which ordered entry of judgment against Petitioner, is reported at 207 So.2d 33 and appears in the Appendix hereto beginning at page 11a. The memorandum opinion of

the Supreme Court of Florida affirming the judgment below is reported at 211 So.2d 169 and appears in the Appendix hereto beginning at page 22a.

JURISDICTION

The judgment of the Supreme Court of Florida was rendered on May 29, 1968. A timely petition for rehearing, with special attention to the questions of international and constitutional law ignored in the court's opinion, was denied by the Supreme Court of Florida on July 1, 1968. (R. 8, p. 1.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Whether execution of the judgment below, by enlarging the obligations of Petitioner, a foreign national, under a contract with another foreign national, made and to be performed in a foreign nation, and by requiring Petitioner to violate the laws of that nation, would

1. cause the United States to violate international law,

2. interfere in the conduct of foreign relations of the United States, and

3. deprive the Petitioner of property without due process of law in violation of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the jurisdiction of the federal courts to apply international law, the prerogative of the federal Executive to conduct the foreign relations of the United States, and the provision of the Fourteenth Amendment prohibiting any State from depriving any person of property without due process of law.

STATEMENT OF THE CASE

Petitioner is one of a number of foreign insurance companies writing insurance throughout the world that come under the jurisdiction of our courts because of insurance written here. Through a branch in Havana, Cuba, Petitioner has written insurance in Cuba, payable in Cuba, and for which it maintains in Cuba the investments necessary to meet its obligations there. These assets cannot be transferred by the company to make payments outside Cuba even on its Cuban policies. (R. 5, p. 49; App. 4a.) Petitioner's Havana branch is subject to severe penalties ("intervention"—in effect, confiscation of its assets) if Petitioner makes payments on its Cuban policies outside of Cuba even from its resources outside of Cuba. (R. 5, p. 50.)

Respondent was until the latter part of 1960 a resident of Cuba and Respondent was and remains a citizen of Cuba (See R. 5, pp. 71-72, 83-84; App. 1a.)

On February 2, 1928, Respondent applied to Petitioner's authorized agent in Havana, Cuba, for a $5,000 life insurance policy requiring an annual premium of $242. The policy (Contract No. 273,630) was issued to Respondent in Havana. (R. 5, p. 71; App. 1a.) It provided that "All payments within the policy, whether they be on the part of the company or the insured, will be effected in the City of Havana, Republic of Cuba. . . ." (R. 5, p. 28.) The insurance contract provided further that any cash surrender value payment "is subject to the condition that there are no legal restrictions." (R. 5, p. 19.)

Both the application and the policy were in the Spanish language. (R. 5, p. 53; see R. 5, pp. 60, 99.)

In 1928, when the policy was issued, the dollar was legal tender in Cuba, *i.e.*, had "debt redeeming force"

under Cuban law, and accordingly the policy was written in dollars. On June 30, 1951, pursuant to legislation duly enacted, the dollar ceased to be legal tender for the discharge of debts payable in Cuba and became simply a foreign currency. (R. 5, p. 46.) All outstanding dollar obligations payable in Cuba became payable in Cuban pesos at the rate of one peso to the dollar. (R. 5, pp. 46-47, 50-51.)

In January 1959, the Batista Government of Cuba was overthrown and replaced by the Castro Government. This new government was and continues to be recognized by the United States and Canada as the Government of Cuba.

On February 23, 1961, the Cuban Government enacted Law No. 930. It provided that the Banco Nacional de Cuba shall control the issue of currency, and that its currency shall be the only "legal tender and shall be admitted in payment of all obligations demandable in the Republic." Obligations agreed upon to be payable in other currency *"shall* be settled and paid *necessarily"* in pesos. (Emphasis added.) Payment abroad even with funds situated abroad is declared to be a felony. (R. 4, p. 49.)

Cuban Law No. 568, enacted October 2, 1959, had earlier forbidden the export of currency or securities, or the transfer of funds abroad except in cases authorized by the Cuban Currency Stabilization Fund. Any unauthorized transfer is made a felony punishable by from six months to three years in prison, or a fine, or both. Corporations "presumed to have infringed the provisions of this law" may be "intervened." (R. 5, pp. 49, 50.) Respondent does not contend he has obtained the authority from the Cuban Currency Stabi-

lization Fund required under Cuban law to collect outside of Cuba on an obligation payable in pesos in Cuba.

In the uncontroverted sworn opinion of the expert witness on Cuban law, the effect of the Cuban laws just discussed is to "prohibit payment to the Plaintiff in any currency other than Cuban Pesos . . ." and to prohibit "payment in any place other than Cuba." (R. 5, p. 51.) Petitioner could not pay Respondent in satisfaction of the judgment directed by the Florida courts without violating Cuban law and incurring severe penalties—even confiscation of its Cuban assets. (R. 5. p. 50.) Petitioner's assets in Cuba, moreover, were invested there and have been maintained there precisely for the purpose of enabling it to make payment on its Cuban insurance contracts. (R. 5, pp. 55-56.)

On December 3, 1960, Respondent wrote to Petitioner demanding payment in dollars in Florida of the cash surrender value of the policy. On December 14, 1960, Petitioner replied offering to make payment in pesos in Cuba in accordance with the Cuban laws governing the policy and in accordance with the express terms of the policy specifying Havana, Cuba, as the place of payment. Petitioner at all times has stood ready to make such payment, or to maintain the policies in effect while both parties await changes in the political and legal climate in Cuba where the assets held for payments under Cuban policies are fully invested.

In Petitioner's reply it was explained to Respondent that

> "The assets which provide for the payment of the above policy are also fully invested in Cuba. We

> are doing our utmost to protect the interests of all our Cuban policyowners but we have been able to find no way to transfer payments from pesos in Havana to any other country." (R. 5, pp. 55-56.)

On March 14, 1966, Respondent petitioned the Circuit Court of the 11th Judicial Circuit, Dade County, sitting in chancery, to order Petitioner to pay to Respondent, in dollars in Miami, the cash surrender value of the life insurance policy. On cross-motions for summary judgment, the Circuit Court ruled for Respondent "on the issue of liability," and provided for a further hearing "to determine the exact amount due for the cash surrender value of this insurance policy sued on and the amount of Attorneys' fees to be awarded to the Plaintiff." (App. 10a, 11a.) The District Court of Appeal for the Third District affirmed the Circuit Court's decision. (App. 21a.) Petitioner then petitioned to the Supreme Court of Florida for review, and on review by writ of certiorari the Supreme Court of Florida, in a brief per curiam order, affirmed, the Chief Justice dissenting. (App. 22a.) Petitioner's petition to the Florida Supreme Court for rehearing and clarification of its decision, praying that the court rule on Petitioner's constitutional and international law arguments, was denied.

The essence of Petitioner's defense throughout the state court proceedings was threefold. First, every aspect of the insurance transaction sued on, including the place of performance, being Cuban, Cuban law governs the transaction, and under Cuban law the Petitioner's obligation to Respondent could be satisfied by Petitioner only by payment to the Respondent of Cuban pesos in Havana, Cuba. Second, since the contract provided for payment in Cuba (and, by operation of

Cuban law, for payment of pesos in Cuba), and since Petitioner was ready to fulfill that obligation, Petitioner had not breached its contract. Third, to ignore these defenses would violate international law, interfere in the conduct of foreign relations, and deprive the Petitioner of property in violation of the Fourteenth Amendment. (R. 5, pp. 32-33, 36-45, 63; R. 7, pp. 2-3.)

The courts in their opinions dealt only with the first and second defenses summarized above and took no notice of the federal and international points strongly urged by the Petitioner. The Circuit Court and the District Court of Appeal relied heavily upon an 1857 decision of this Court, *Secombe* v. *Steele,* 61 U.S. (20 How.) 94, but that decision simply applied federal common law in a situation which had nothing to do with whether a state court may enlarge the obligations of a foreign national under a foreign contract that had no connection whatsoever with the United States.

REASONS FOR GRANTING THE WRIT

This is one of a series of suits brought by Cuban citizens in United States courts seeking payment in dollars in the United States of the cash surrender value of life insurance policies purchased in Cuba from Canadian insurance companies. Suits on such policies payable in Cuba are presently pending in Massachusetts and New York as well as Florida. The decision in this case is contrary to the leading decided cases. *Confederation Life Ass'n* v. *Ugalde,* 164 So.2d 1 (Fla. 1964), *cert. denied,* 379 U.S. 915; *Present* v. *United States Life Ins. Co.,* 96 N.J. Super. 285, 232 A.2d 863 (1967), *aff'd,* 51 N.J. 407, 241 A.2d 237 (1968). Compare *Varas* v. *Crown Life Ins. Co.,* 204 Pa. Super. 176, 203 A.2d 505 (1964), *cert. denied,* 382

U.S. 827.* See also *Dougherty* v. *Equitable Life Assur. Soc'y and 25 Other Cases,* 266 N.Y. 71, 193 N.E. 897 (1934); *Home Ins. Co.* v. *Dick,* 281 U.S. 397; *Norman* v. *Baltimore & Ohio R.R.,* 294 U.S. 240.

This is the only case in which an express provision for payment in Cuba has been disregarded. It is also the only case in which the record showed that the company maintained assets in Cuba to cover *fully* its Cuban obligations. It is thus a case of flagrant interference by the courts of a state in transactions with which the state had no connection. It is thus a case where the courts of a state have changed the obligations of parties to a contract, expressly embodied in that contract, giving one party a recovery not contemplated in the contract at the expense of the other. It is thus a case where the injury to Petitioner, which has maintained investments in Cuba to cover its Cuban obligations, and which remains subject to Cuban law in regard to these policies, is indisputably clear; Petitioner stands to have its Cuban assets confiscated if it satisfies the Florida courts' judgment. The District Court and the Supreme Court of Florida have each expressly denied Petitioner's request that their opinions face up to and pass upon the questions of constitutional law and international law raised by their subjecting Petitioner to liability by the application of Florida law to a transaction with which Florida had and has no significant connection.

1. Violation of International Law

International law is violated when a court, under the guise of applying a local conflict of laws rule, undertakes to alter rights and obligations of a national of a

* The *Varas* case differed fundamentally from the leading cases cited and from this case in that the contract there did not designate Cuba as the place of payment.

foreign state arising out of a transaction having no substantial contact with the forum state. Restatement, The Foreign Relations Law of the United States, § 19 (1965).* When, as here, the foreign national is injured by this process, "the court commits an international delict and subjects the State to diplomatic representations or the possible award of damages or other reparation by an international tribunal." Stevenson, *The Relationship of Private International Law to Public International Law,* 52 Col. L. Rev. 561 (1952) at 574, citing Beckett, *What Is Private International Law?,* 7 Brit. Y. B. Int'l L. 73, 75 (1926). See also League of Nations Doc. No. 1929. V. 10 at 10-11; Hague Codification Conference of 1930, Minutes of the Third Committee, League of Nations Doc. No. 1930. V. 17 at 237; 5 Hackworth, *Digest of International Law* 526 *et seq.* (1943) and cases there cited; Briggs, *The Law of Nations* 678 (1952); Brierly, *The Law of Nations* 215 (4th ed. 1953).

The United States Government itself has espoused a similar claim on behalf of a United States citizen. In *The Alsop Claim (United States* v. *Chile),* submitted under Protocol of 1909, 5 Am. J. Int'l L. 1079 (1911), the United States contended that the application of Chilean law by a Chilean court, in a suit brought by a United States citizen asserting rights under an alleg-

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* "[A] state cannot obtain control over conduct not within its jurisdiction to prescribe by applying a choice of law rule designed to govern conduct rather than to adjudicate claims growing out of conduct." *Id.,* Comment d. The earlier draft put the same rule as follows: "[A] state cannot obtain control over conduct not within its jurisdiction to prescribe by the simple device of inventing a choice of law rule to be applied in the particular case for the purpose of giving effect to a rule of its own law designed to govern conduct." *Id.* (Proposed Official Draft, 1962).

edly Bolivian contract, wrongfully deprived the United States citizen of contractual interests possessed under controlling Bolivian law, "for which action the Government of Chile is liable to respond in damages under . . . well-known and universally recognized principles of international law . . . ." U.S. Dep't of State, The Alsop Claim—The Case of the United States 211 (G.P.O. 1910). The principle, which the tribunal did not question,* clearly applies here where the rights of the Respondent and Petitioner were established under Cuban law before Respondent left Cuba and made demand in Florida.

In *Lauritzen* v. *Larsen,* 345 U.S. 571, a limited construction was given by this Court to the jurisdictional scope of the Jones Act primarily because a broader construction would not have been in conformity with principles of international law just discussed. The case involved negligent injury to a Danish seaman on board a Danish ship in Havana harbor. The employment contract was made in New York, the seaman was returned to New York at the completion of the agreed period of service, and the ship itself frequently and regularly stopped at United States ports. *Id.* at 582-83. The Court, after noting that contacts with Denmark were nevertheless clearly predominant, observed

> "in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a

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* The tribunal denied the claim for failures in the claimant's proof of Bolivian law. See 5 Am. J. Int'l L. at 1097.

> foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction." *Id.* at 582.

Our statutes, the Court declared, should be "construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law." *Id.* at 577.

In *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, following *Lauritzen,* the Court declared:

> "The controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them we must move with the circumspection appropriate when this Court is adjudicating issues inevitably entangled in the conduct of our international relations. We need not repeat the exposition of the problem which we gave in *Lauritzen* v. *Larsen.* Due regard for the relevant factors we there enumerated, and the weight we indicated to be given to each, preclude application of American law to the claims here asserted." *Id.* at 383.

The fact that a state court rather than a federal court has sought to impose its law to control the transaction at bar is no defense to the United States under international law. See, *e.g.,* 5 Hackworth, *Digest of International Law* 595 (1943); Restatement, The Foreign Relations Law of the United States, § 170 (1965). The issue of whether the Florida courts' judgment places the United States in violation of international law is therefore one of direct and paramount federal concern.

This was settled in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 425, where the Court expressly approved the view of Professor Philip C. Jessup, now a

member of the International Court of Justice, "that rules of international law should not be left to divergent and perhaps parochial state interpretations." *Ibid.* Such matters, the Court said, "must be treated exclusively as an aspect of federal law." *Ibid.*

Apart from the violation of substantive international law there will be a denial of procedural justice under international law if the decision below is permitted by this Court to stand. Procedural justice under international law will have been denied on two counts, first, the refusal of the courts to pass upon the constitutional and international law issues involved and, second, the bias manifested against Petitioner, a Canadian company, and the prejudice disclosed against respect for the currency laws of another country because of the courts' dislike for the regime now ruling there.*

Denial of this petition would give Canada grounds for seeking from the United States reparation under international law for the losses inflicted in this case and the series of cases which may follow its lead.

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* The Florida Circuit Court's opinion ill conceals its bias against Petitioner, and in favor of "these new Americans," deprived, the court said, of what "is rightfully due them . . . while Defendant's coffers bulge with bullion . . .." (App. 8a.) The exercise of such bias against a foreign national clearly constitutes a denial of justice, as does the refusal of the Florida courts to consider and pass upon Petitioner's claims. Restatement, The Foreign Relations Law of the United States, § 185; Freeman, International Responsibility of States for Denial of Justice 328-331 (1938).

The courts might have shown less bias against Petitioner had they taken into account that Petitioner is a mutual company with a great many American policyholders whose annual insurance cost is increased whenever a court awards any policyholder more than his policy insures him against. Petitioner's American policyholders will be among those injured if Petitioner is visited with a double injury through application of the Cuban penal laws which the decisions here would require Petitioner to violate.

2. Interference in the Conduct of Foreign Relations

The judgment of the Florida courts amounts to a direct interference in the conduct of foreign relations of the United States. Under doctrines that this Court has very recently had occasion to reaffirm, such a judgment cannot constitutionally stand.

The recent decision of this Court to which we refer is *Zschernig* v. *Miller,* 389 U.S. 429, decided just last term. There the Oregon court applied its inheritance statutes in such a way as to interfere with the foreign relations power. In *Zschernig,* this Court, reviewing the decisions of state courts respecting inheritances of citizens of so-called "iron curtain" countries that followed *Clark* v. *Allen,* 331 U.S. 503, found that the decisions "radiate some of the attitudes of the 'cold war,' where the search is for the 'democracy quotient' of a foreign regime as opposed to the Marxist theory." 389 U.S. at 435. As the Court continued, "That kind of state involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government—is not sanctioned by *Clark* v. *Allen.*" *Id.* at 436. The attitudes of the courts which this Court found interfered with foreign policy are catalogued in *Zschernig. Id.* at 437-439, n. 8.

The Court found that the Oregon courts in the decisions leading up to *Zschernig* had in fact decided whether or not a foreign legatee was entitled to inherit by construing the statute in accord with a "[so]cial criticism of nations established on a more auth[oc]rarian basis than our own." *Id.* at 440. This, [the] Court found, "affects international relations in a [per]sistent and subtle way." *Ibid.* Regulation by [the] states of descent and distribution of estates must [follow] a way if it

impairs "the effective exercise of the Nation's foreign policy." *Ibid.* And, like Oregon's action in *Zschernig,* Florida's action here "has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems." 389 U.S. at 441. Like Oregon's action in *Zschernig,* Florida's action here illustrates "the dangers which are involved if each State, speaking through its . . . courts, is permitted to establish its own foreign policy." *Ibid.*

The decision of the Florida courts similarly is based primarily upon foreign policy considerations. The distaste of the judges below for the present Government of Cuba (not to mention the foreign nationality of the insurer) has infected their decisions in a way indistinguishable from cases outlined by this Court in *Zschernig* v. *Miller,* 389 U.S. at 437-439, n. 8, and is, flatly, an interference by the state courts in an area that is forbidden to them by this Court's decision. To allow a court's view of the economic or political system prevailing in the foreign country to influence its decision, as this Court held in *Zschernig* v. *Miller,* is an interference with the exclusive prerogative of the Federal Government to conduct our foreign policy.

3. Deprivation of Property Without Due Process

The application of Florida law by the courts below, to create rights and impose obligations where none exists under Cuban law, and to compel Petitioner to make a payment which it is prohibited from making by Cuban law, violates the Fourteenth Amendment.

In an unbroken line of decisions this Court has recognized the rule that the Fourteenth Amendment forbids a court of the United States from applying the substantive law of the forum to enlarge obligations under a

contract that is clearly governed by foreign law. *Clay* v. *Sun Ins. Office, Ltd.*, 377 U.S. 179, 181-82; *Clay* v. *Sun Ins. Office, Ltd.*, 363 U.S. 207, 210-11; *Watson* v. *Employers Liab. Assur. Corp.*, 348 U.S. 66, 70-73; *Lauritzen* v. *Larsen*, 345 U.S. 571, 590-91; *Hartford Accident & Indem. Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143; *Home Ins. Co.* v. *Dick*, 281 U.S. 397; *Aetna Life Ins. Co.* v. *Dunken*, 266 U.S. 389, 399-400; *New York Life Ins. Co.* v. *Dodge*, 246 U.S. 357; *New York Life Ins. Co.* v. *Head*, 234 U.S. 149; *Allgeyer* v. *Louisiana*, 165 U.S. 578; *cf. McGee* v. *International Life Ins. Co.*, 355 U.S. 220; *International Shoe Co.* v. *Washington*, 326 U.S. 310. See also *Zimmermann* v. *Sutherland*, 274 U.S. 253, 255-56; *Deutsche Bank Filiale Nurnberg* v. *Humphrey*, 272 U.S. 517, 519. The decision below wholly ignores this settled rule.

The decision below is particularly repugnant to the command of the Fourteenth Amendment in that it not only applies local law to alter and enlarge obligations pertaining to a transaction with which the forum has no significant contact, but seeks affirmatively to compel Petitioner to violate the law of Cuba—the only jurisdiction with which the transaction has significant contacts. Even where the forum has predominant interests in the matter being litigated, this Court has recognized the constitutional problem that is presented by an order requiring a party to violate foreign law. *Société Internationale* v. *Rogers*, 357 U.S. 197, 211-12.

CONCLUSION

Execution of the judgment below would (1) cause the United States to violate international law, (2) interfere in the conduct of our foreign relations and (3) deprive Petitioner of property without due process of

law. Furthermore, refusal of the courts below to pass upon these constitutional and international law issues constitutes a denial of procedural justice, itself a violation of international law. Petitioner accordingly prays that this petition for certiorari be granted.

Respectfully submitted,

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September 25, 1968

INDEX TO APPENDIX

	Page
Opinion of Circuit Court	1a
Opinion of District Court of Appeal	11á
Opinion of Supreme Court of Florida	22a

IN THE
CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA.

No. 66C 2707 (Judge Dekle)

MANUEL ANTONIO VEGA Y ARMINAN, *Plaintiff*,

v.

CONFEDERATION LIFE ASSOCIATION, a Canadian insurance corporation, *Defendant*.

Opinion and Order on Motion for Summary Judgment

The above and foregoing cause, coming on to be heard on the Motion of the Plaintiff for Summary Judgment, and the Motion of the Defendant for Summary Judgment, and the Court being fully advised in the premises, the Court makes the following findings of fact:

1. The Plaintiff is a resident of Dade County, Florida, and is sui juris. The Defendant is a Canadian insurance corporation authorized to do business in Florida and doing business in Florida, with its principal place of business in Toronto, Canada.

2. This Court has jurisdiction of the subject matter and the parties hereto.

3. On or about February 28, 1928, the Defendant, for a valuable consideration, executed and delivered to the Plaintiff its insurance policy No. 273630 in the City of Havana, Cuba, while the Plaintiff was a resident of Cuba. The Defendant agreed to insure the life of the Plaintiff for the sum of Five Thousand and no/100 ($5,000.00) Dollars and agreed that the value of the cash or surrender value of the policy after an interval of twenty (20) years had passed would be a sum in the amount of Five Thousand Eight Hundred Twenty-Five and no/100 ($5,825.00) Dollars if the Plaintiff made yearly payments from February

14, 1928, the date of issuance of the said policy, until February 14, 1947, making a total of twenty (20) yearly payments in the sum of Two Hundred Forty-Two and no/100 ($242.00) Dollars per payment. The Plaintiff duly paid all of the premiums required to be paid by the terms of the said policy of insurance, and the said policy is still in force and effect.

4. All of the said premium payments were made in United States Dollars in Havana, Cuba.

5. On or about July 1, 1951, the government of Cuba enacted and put into effect Decree No. 1384. Law No. 568 was enacted and became effective on or about October 2, 1959, in Cuba, and Law No. 930, was enacted and became effective in Cuba on or about February 23, 1961. The said laws and decrees are generally known as the Cuban Monetary Control Laws, and have the effect of requiring that all obligations payable in Cuba be paid in Cuban pesos.

6. On or about March 7, 1961, in the City of Miami, Florida, Plaintiff duly demanded of the Defendant payment of the said cash surrender value of the said policy, as of that date, according to the schedule appearing on Page 2 of the said policy. The Defendant refused and still refuses to pay the said cash surrender value in any place other than in Havana, Cuba, and in any currency other than Cuban pesos.

7. The Plaintiff was a resident of Cuba on or about January 1959, when a violent revolution took place in Cuba by which the lawful government of Cuba was deposed and a revolutionary government seized power and has since that time maintained its power over Cuba as the *de facto* government. Because of the Plaintiff's opposition to the revolutionary government, the Plaintiff could no longer remain in Cuba without great fear for his life and safety, and the lives and safety of his family and did, there-

fore, on or about September 2, 1960, depart from Cuba and take up residency in the United States of America in the City of Miami, Florida. Plaintiff is now a permanent resident of the State of Florida and was granted permanent immigrant registration No. A-12-447-101, on or about June 2, 1964, by the United States government. The Plaintiff is prevented from entering Cuba because of fear for his life or imprisonment at the hands of Cuba.

8. Plaintiff proceeded, at law, on or about April 27, 1961, in an action against the Defendant on the said insurance policy No. 273630 in the Circuit Court in and for Dade County, Florida, at Law, No. 61L-1651, wherein a Final Order of Dismissal, without prejudice, was entered on January 14, 1965, by the Circuit Judge, leaving the Plaintiff without remedy in a Court of Law.

9. The Defendant has, and still maintains, that it will pay to the Plaintiff the cash surrender value of the said policy, but only in Havana, Cuba, in Cuban pesos, and has refused to pay the said sums in the United States to the Plaintiff in United States dollars.

10. The Plaintiff was required to, and did, employ the attorneys of record in this cause to institute suit on his behalf to recover the said sums and has thereby become obligated to pay his attorneys a reasonable attorney's fee for their services.

11. The terms of the policy provide, *inter alia*, that:

(a) "all payments under this policy will be in legal tender of the United States of America",

and that:

(b) "all payments under this policy whether by the company or the insured shall be made in the City of Havana, Cuba; except that the insured may, with the consent of the company, make his payments elsewhere."

OPINION

The Court, in view of the foregoing findings of fact, is of the opinion that a Court of Equity should grant the Plaintiff the relief which he seeks.

The Florida Supreme Court in *Confederation Life Association* v. *Ugalde,* 164 So. 2d 1 (Fla. 1964), held that the Florida courts were obligated by the International Monetary Fund Agreement to apply the Cuban Monetary Laws to contracts payable in Cuba, and since the Defendant offered to make payment of the cash surrender value of the policies in issue in accordance with the law of Cuba in Cuban pesos in Havana, there was no breach of contract and a Florida court could not require payment here or in any other currency. The Defendant argues that the *Ugalde* decision bars the Plaintiff's action here because it has offered to make payment in Cuban pesos in Havana, Cuba.

The law is relative and must relate to *current* conditions. The condition, or predicate, upon which *Ugalde* rests is expressed in that opinion as being the then existing International Monetary Fund Agreement[1] which, the court expressly held, *obligated* the Florida courts "* * * * to apply the cited Cuban laws to the contract here involved * * *." These laws were, of course, the often cited Legal Tender Law of 1948[2] and Cuban Law No. 930 of February 23, 1961, prohibiting contract payments in other than Cuban pesos as the only legal tender, and Cuban Law No. 568 on October 2, 1959, which forbade the export of currency or transfer of funds abroad.

Article VIII (2) (h) of the International Monetary Fund Agreement (or treaty) binds each of the signatory nations to enforce the monetary regulations of the other.

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[1] Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. 1501.

[2] Cuban Law No. 13, Dec. 23, 1948, effective in 1951 by Decree No. 1384.

Subsequent to *Ugalde*, on April 3, 1964, Cuba withdrew from the International Monetary Fund treaty and thus removed the reason or predicate for the holding in *Ugalde*. (In this cause the Defendant does not plead nor rely upon the International Monetary Fund Agreement). The courts of Florida and of the United States are, therefore, no longer bound or to be guided by said Cuban Laws but may now freely apply American principles of law and equity. *Blanco* vs. *Pan American Life Insurance Company*, (S.D. Fla. 1963) 221 F. Supp. 219, 226; *Pan American Life Ins. Co.* v. *Blanco*, (5th Cir. 1962) 311 F.2d 424. It therefore appears that the Plaintiff can now obtain relief in the Florida courts for enforcement of his rights under a policy of insurance payable in Cuba. The Castro decrees have no extraterritorial effect. *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100, 101, 435 S. Ct. 504, 67 L. Ed. 894 (1923).

It may also be noted that *Ugalde* was an action strictly at *law* whereas the case *sub judice* is in *equity* and invites for the first time the consideration of equitable principles.

Even if Cuban Monetary Laws were still considered here, these were enacted subsequent to the final premium payments by the Plaintiff which vested his rights prior to such abrogating Cuban Laws.

Although Plaintiff might be unable to recover any meaningful amount at law, he may by a suit in equity recover what is admittedly due him under the policy. The case of *Secombe* v. *Steele*, 61 U.S. (20 How.) 833 (1858), gives the following rule at Page 836:

> "At law, if there is an express agreement for the payment of the purchase money, and the delivery of the conveyance of the land by a particular day, and at a particular place, the parties will be bound by it, and time will be of the essence to the contract . . . Time may be made of the essence by the contract

by express stipulation, or it may become essential by considerations arising from the nature of the property, or the character of the interest bargained. And the principle of a court of equity does not depend upon considerations collateral to the contract merely, nor on the conduct of the parties subsequently, showing that time was not of the essence of the contract in the particular case.

But it must affirmatively appear that the parties regarded time or place as an essential element in their agreement, or a court of equity will not so regard it.

In *Parkin* v. *Thorold,* 16 Beav., 59, the Master of the Rolls said: 'A contract is undoubtedly construed alike both in equity and at law; nay, more—a court of law is a proper tribunal for determining the construction of it. But courts of equity make a distinction in all cases between that which is a matter of substance and that which is a matter of form; and if it finds that, by insisting on form, the substance will be defeated, it holds it to be inequitable to allow a person to insist upon such form, and thereby defeat the substance. For instance, *A* has contracted to sell an estate to *B,* and to complete the title by the 25th of October; but no stipulation is introduced, that either party considers time of the essence of the contract. *A* completes the title by the 26th; at law, the contract is at an end, and *B* may bring an action for the non-performance of the contract, obtain damages for the breach; but equity holds, that unless *B* can show that the delay of 24 hours really produced some injury to him, he is not permitted to bring this action or to avoid the performance of the contract; not, certainly on the grounds that the 25th of October was not a part of the contract, but on the grounds that it is unjust that *B* should escape the performance of contract which has been substantially performed by *A,* by

reason of some omission in a formal but immaterial portion of it.' "

Defendant asserts that if Plaintiff were to collect United States dollars from the Defendant that it would be a "transaction in foreign exchange" prohibited under the Cuban Assets Control Regulations, and thus, Defendant would be committing a felony under the laws of Cuba. However, the Defendant would not be making a *payment* under the contract sued upon, but instead there would be an execution by the Plaintiff by levy on the assets of the Defendant. Moreover, this Court cannot under any circumstances give extraterritorial effect to Cuban criminal regulations.

Florida Statutes (624.0221) provide expressly that as a condition prerequisite to doing business in the State of Florida, a foreign corporation consents to the appointment of the Treasurer of the State of Florida as its agent for the Service of Process. In addition, such foreign insuror must post a cash reserve or otherwise prove some financial responsibility (Sec. 624.0210). If it can be served with process in the State of Florida, and if a cash reserve or equivalent is required of it as a prerequisite to do business, it must follow that judgment may be entered against such company and such judgment collected as any other judgment regardless of the place fixed for performance in the insurance contract. The cause of action is transitory. *Confederation of Canada Life Insurance Company* vs. *Vega y Arminan,* Fla. App. 1961, 135 So. 2d 867, Cert. denied with opinion, 144 So. 2d 805; *Clay* vs. *Sun Insurance Office, Ltd.,* 363 U.S. 207, 80 S. Ct. 1224, 4 L. Ed. 2nd 1170.

Plaintiff is now a permanent resident of Florida and of the United States of America and not in the role of a Cuban National which was the case in *Ugalde* and other earlier decisions. The court is also aware that many of those who first fled from the tyranny of the Castro gov-

ernment are now citizens of the United States. It is inconceivable that these new Americans should, if the Defendant's point were to be sustained, be required to return to Cuba to collect that which is rightfully due them, and, as this Plaintiff, be unable safely to do so, while Defendant's coffers bulge with bullion rightly theirs.

The insurance company next argues that if it is required to respond to a judgment entered by this court, it will be penalized in that it will be required to pay twice, once here and once in Cuba. This argument is fallacious in that it presumes that the Cuban Courts will not give recognition to the decrees of this court, validly entered in accordance with all principles of International Law. The court will not indulge such a presumption at the expense of the policyholder.

Neither does it appear that the Defendant insurance company cannot pay the Plaintiff without violating the Cuban Law. The policy makes no reference to being paid *solely* out of assets located physically in Cuba. *Blanco* vs. *Pan American Life Insurance, Company, supra.* Thus, it is distinguishable from the policies involved in the so-called Russian insurance cases. See: *Dougherty* vs. *Equitable Life Assurance Soc.,* 266 N.Y. 71, 193 N. E. 89 (1934). In the Russian cases, the policies clearly set forth that the parties agreed to be governed by Russian law and were to be paid solely from Russian assets.

Equity imputes an intention to fulfill an obligation. The obligation in this case is the benefit due by the Defendant to the Plaintiff under his policy.

In equity, various maxims consisting of broad general rules or principles are recognized and enforced; they are subject to limitations and exceptions, and one maxim may limit or restrict the use of another, or a combination of several maxims may control the decision. Equity seeks to do justice and avoid injustice, and is not bound by

strict common-law rules. A court of equity is a court of conscience; it seeks to do justice in equity between all parties; it seeks to strike a balance of convenience as between litigants; and it looks at the whole situation. It does not act unless justice and good conscience demand that relief should be granted, and acts only in accordance with conscience and good faith. It is particularly well-known that equity seeks to prevent unjust enrichment, and will not permit one to be enriched unjustly at the expense of another.

It is stated in 30 CJS, Equity, § 103, p. 1066, (1965):

> "[E]quity devises means for enforcing a lawful result, when legal procedure is inadequate. In a broad sense the maxim means that equity follows the law to the extent of obeying it and conforming to its general rules and policies whether contained in the common or statute law. While the maxim is true as a general rule, equity does not always follow the law. Equity follows the law only so far as the law goes in securing the rights of the parties. Although the maxim has frequently been given as a reason for refusing to create rights or liabilities unrecognized at law when not justified by equitable considerations, the maxim does not apply in those matters which entitle a party to equitable relief, although the strict rule of law is to the contrary, and must be considered together with the maxim, . . . that equity will not suffer a wrong to be without a remedy."

Equitable jurisdiction is best summed up by the following found in 30 CJS, Equity, § 105, p. 1070, (1965):

> "Equity will not suffer a wrong, or, as sometimes stated, a right, to be without a remedy and this maxim includes the whole theory of equity jurisdiction, and affords relief whenever a right exists and no adequate remedy at law is available."

As was pointed out in the case of *Secombe* v. *Steele, supra,* equity regards substance rather than form. The maxim, or its substantial equivalent, that regards substance rather than form has been frequently stated and applied. *Bruce's Juices* v. *King,* 61 So. 2d 175 (Fla. 1952). In *Schupler* v. *Eastern Mortg. Co.,* 33 So. 2d 586 (Fla. 1948) Justice Barnes stated, at page 592:

> "Equity regards the substance, and not the form: 'The maxim, equity regards substance rather than form, is expressed in various ways and stresses the intent or spirit of the case. A court of equity, it is said, will look to the circumstances and not to the form of the transaction.' . . ."

In the instant case there is no doubt that the Plaintiff would have an absolute right to a meaningful recovery were it not for the revolution in Cuba. The only portion of the insurance contract with which the Plaintiff cannot literally comply is the requirement that payment be made to him in Havana. The fact that Cuba, subsequent to the inception and full payment of the contract, enacted a monetary control regulation requiring all payments which are made in Cuba to be made in Cuban pesos, may prevent the Plaintiff's recovery at law. However, applying the maxim that equity looks at the substance rather than the form of the transaction and since the primary purpose of this transaction is the payment of the cash surrender value of the policy after a period of twenty (20) years, and the provision of payment being made in Havana is merely for the convenience of the parties, there is no equitable reason why the Plaintiff should not recover.

THEREFORE, it is ORDERED, ADJUDGED and DECREED that:

1. The Defendant's Motion for Summary Judgment be and it is hereby denied.

2. The Plaintiff's Motion for Summary Judgment be and it is hereby granted on the issue of liability.

3. Plaintiff shall set a further hearing in this cause to determine the exact amount due for the cash surrender value of this insurance policy sued on and the amount of Attorneys' fees to be awarded to the Plaintiff.

DONE AND ORDERED in Chambers, this 27 day of March, 1967, at Miami, Dade County, Florida.

HAL P. DEKLE
Circuit Judge

IN THE
DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1968

Case No. 67-695

CONFEDERATION LIFE ASSOCIATION, a Canadian insurance corporation, *Appellant*,

VS.

MANUEL ANTONIO VEGA Y ARMINAN, *Appellee*.

Opinion Filed January 23, 1968

An Interlocutory Appeal from the Circuit Court for Dade County, Hal P. Dekle, Judge.

Shutts & Bowen and Cotton Howell, for appellant.

Helliwell, Melrose & DeWolf and Michael G. Martin, for appellee.

Before PEARSON HENDRY and SWANN, JJ.

HENDRY, Judge.

This case involves a claim in equity by a Cuban refugee against a Canadian insurance company for the cash surrender value of a policy of life insurance. The court below entered an order denying defendant's motion for summary

judgment, granting summary judgment in favor of the plaintiff on the issue of liability only, and reserving jurisdiction to determine the exact amount of plaintiff's recovery, including any allowable attorney's fees. The defendant insurance company seeks review of the lower court's order by interlocutory appeal.

The material facts disclosed by the pleadings, together with the supporting affidavits, are not disputed. We quote from the chancellor's summary of those facts as contained in the order appealed:

> "1. The Plaintiff is a resident of Dade County, Florida, and is sui juris. The Defendant is a Canadian insurance corporation authorized to do business in Florida and doing business in Florida, with its principal place of business in Toronto, Canada.
>
> "2. This court has jurisdiction of the subject matter and the parties hereto.
>
> "3. On or about February 28, 1928, the Defendant, for a valuable consideration executed and delivered to the Plaintiff its insurance policy No. 273630 in the City of Havana, Cuba, while the Plaintiff was a resident of Cuba. The Defendant agreed to insure the life of the Plaintiff for the sum of Five Thousand and No/100 ($5,000.00) Dollars and agreed that the value of the cash or surrender value of the policy after an interval of twenty (20) years had passed and would be a sum in the amount of Five Thousand, Eight Hundred, Twenty-five and No/100 ($5,825.00) Dollars if the Plaintiff made yearly payments from February 14, 1928, the date of issuance of the said policy, until February 14, 1947, making a total of twenty (20) yearly payments in the sum of Two Hundred, Forty-two and No/100 ($242.00) Dollars per payment. The Plaintiff duly paid all of the premiums required to be paid by the terms of the said policy of insurance, and the said policy is still in force and effect.

"4. All of the said premium payments were made in United States Dollars in Havana, Cuba.

"5. On or about July 1, 1951, the government of Cuba enacted and put into effect Decree No. 1384. Law No. 568 was enacted and became effective on or about October 2, 1959, in Cuba, and Law No. 930, was enacted and became effective in Cuba on or about February 23, 1961. The said laws and decrees are generally known as the Cuban Monetary Control Laws, and "have the effect of requiring that all obligations paybale in Cuba be paid in Cuban pesos".

"6. On or about March 7, 1961, in the City of Miami, Florida, Plaintiff duly demanded of the Defendant payment of the said cash surrender value of the said policy, as of that date, according to the schedule appearing on Page 2 of the said policy. The Defendant refused and still refuses to pay the said cash surrender value in any place other than in Havana, Cuba, and in any currency other than Cuban pesos.

"7. The Plaintiff was a resident of Cuba on or about January 1959, when a violent revolution took place in Cuba by which the lawful government of Cuba was deposed and a revolutionary government seized power and has since that time maintained its power over Cuba as the *de facto* government. Because of the Plaintiff's opposition to the revolutionary government, the Plaintiff could no longer remain in Cuba without great fear for his life and safety, and the lives and safety of his family and did, therefore, on or about September 2, 1960, depart from Cuba and take up residency in the United States of America in the City of Miami, Florida. Plaintiff is now a permanent resident of the State of Florida and was granted permanent immigrant registration No. A-12-447-101, on or about June 2, 1964, by the United States government. The Plaintiff is prevented from entering Cuba

because of fear for his life or imprisonment at the hands of Cuba.

"8. Plaintiff proceeded at law, on or about April 27, 1961, in an action against the Defendant on the said insurance policy No. 273630 in the Circuit Court in and for Dade County, Florida, at Law, No. 61L-1651, wherein a Final Order of Dismissal, without prejudice, was entered on January 14, 1965, by the Circuit Judge, leaving the Plaintiff without remedy in a Court of Law.

"9. The Defendant has, and still maintains, that it will pay to the Plaintiff the cash surrender value of the said policy, but only in Havana, Cuba, in Cuban pesos, and has refused to pay the said sum in the United States to the Plaintiff in United States dollars.

"10. The Plaintiff was required to, and did, employ the attorneys of record in this cause to institute suit on his behalf to recover the said sums and has thereby become obligated to pay his attorneys a reasonable attorney's fee for their services.

"11. The terms of the policy provide, *inter alia*, that:

(a) 'all payments under this policy will be in legal tender of the United States of America',

(b) 'all payments under this policy whether by the company or the insured shall be made in the City of Havana, Cuba; except that the insured may, with the consent of the company, make his payments elsewhere'."

To the foregoing summary we would add only a few of the remaining pertinent parts of the insurance policy taken from the English translation which appears in the record on appeal. The first of these policy parts is a

paragraph entitled, "Residence, Travel and Occupation", which reads:

> "No restriction obliges the insured under this policy regarding residence, travel or occupation, except those mentioned in the clauses covering total incapacity and double indemnity in case of accidents if these two clauses or any of them should be attached to this policy."

Secondly, a portion of another paragraph proclaims:

> "This Contract Is Integral And Invariable
>
> ". . . This contract may not be amended or modified in any way unless such amendment or modification should be verified by writing by one of the members of the executive personnel of the Company in the home office in Toronto, Canada, . . ."

Finally, a paragraph appears on the cover of the policy stating:

> "Important Notice"
>
> * * *
>
> "2. It is not necessary for the assured or the beneficiary of this policy to utilize any person, firm or corporation to collect this insurance or to obtain some of the benefits indicated by the policy. Write directly to the Confederation of Canada or communicate with the authorized agent of the Company which has his residence nearest the place where you are and who is obligated to attend and facilitate for you any arrangement without any expenses for you."

It should be stressed that the Confederation Life Association does not deny that it has a contractual obligation to the plaintiff. The essence of the insurer's defense is that Cuban law, coupled with the terms of the policy,

create an obligation of such a nature that it may be satisfied only by payment to the insured of Cuban pesos at Havana, Cuba.

In support of its defense, appellant contends that the issues presented in the cause sub judice are controlled by the leading Florida case of Confederation Life Association v. Ugalde[1] and the attendant line of cases.[2] We are of the opinion, however, that certain events materially affecting the applicable law have occurred since the Ugalde decision which necessitate a re-examination of this Court's position in such cases.

The lower court's jurisdiction over the person of the appellant is not contested,[3] nor is it disputed that the appellee may seek to enforce his contractual rights in the courts of this State.[4] The initial problem confronting the court, then, is to determine what law to apply.

The chancellor found that the contract of insurance in this case was entered into in Cuba, by and between a Cuban resident and a Canadian insurance company doing

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[1] Confederation Life Association v. Ugalde, Fla. App. 1963, 151 So. 2d 315, cert. granted, Fla. 1964, 164 So. 2d 1, cert. denied, 379 U.S. 915 (1964).

[2] Sun Life Assurance Company of Canada v. Klawans, Fla. App. 1964, 162 So. 2d 702, cert. granted, Fla. 1964, 165 So. 2d 166; Crown Life Insurance Company v. Calvo, Fla. App. 1963, 151 So. 2d 687, cert. granted, Fla. 1964, 164 So. 2d 813; Confederation Life Association v. Brandao, Fla. App. 1964, 173 So. 2d 514, cert. denied, Fla. 1965, 173 So. 2d 457; Trujillo v. Sun Life Assurance Company of Canada, Fla. App. 1964, 166 So. 2d 473.

[3] Confederation of Canada Life Insurance Company v. Vega y Arminan, Fla. App. 1962, 135 So. 2d 867, cert. denied, Fla. 1962, 144 So. 2d 805.

[4] Sec. 4, Declaration of Rights, Florida Constitution, 25 F.S.A. See also, United States v. Wong Kim Ark, 196 U.S. 649 (1898), at 695, 696.

business in Cuba. Under the terms of the policy, payments were to be made in Havana. Thus, counsel for the appellant argues that the ancient maxim of lex loci contractus applies, and that the law of the place of the contract should govern, that law being Cuban law. There is substantial conflict of authority regarding the test to be used in determining what law to apply. Four separate tests are most generally recognized: (1) the "grouping of contracts" or "center of gravity" test; (2) the "intent of the parties" test; (3) the "place of the contract" test; and (4) the "place of performance" test.[5] While there exists no authority in Florida which specifically rejects other tests, it has been held that the lex loci contractus is preferable.[6] However this may be, we are unwilling to join appellant in its contention that the situs of the contract in this case is the Republic of Cuba.

Whereas the situs of the original insurance contract may have been Cuba, it neither logically nor necessarily follows that the situs of the completed cash surrender value option is the same. Generally, a contract is considered as having been entered into in that place in which the offer is accepted, or where the last act necessary to complete the contract is performed.[7] It is clear that under the terms of the insurance contract as it was written initially, there existed no fixed obligation on the part of the company to pay to the insured the cash surrender value of the policy.[8] In other words, there is no contract in regard to the cash surrender value. Rather, the cash surrender value clause constitutes a continuing, irrevocable offer by the company, which offer matures into a contractual obligation only upon

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[5] 17 C.J.S. Contracts §§ 12.2-12.5 (1963).

[6] Brown v. Case, 80 Fla. 703, 86 So. 684 (1920).

[7] 17A C.J.S. Contracts § 356 (1963).

[8] United States v. Penn Mut. Life Ins. Co., 130 F. 2d 495 (3 Cir., 1942).

its being accepted by the insured.[9] The acceptance by the insured of the company's offer was also the last act necessary to complete the contract, and it was performed in Florida. Under the general rule, then, Cuba cannot be the situs of this contract.

However, appellant goes further in its contention. It is argued that, regardless of the lex loci contractus doctrine, Cuban law must be given extraterritorial effect in this case because of the International Monetary Fund Agreement.[10] We consider this to be the heart of the Ugalde decision.[11] The Florida Supreme Court in Ugalde held:

> "The Cuban laws relating to the establishment of currency control are similar to those which have been enacted in this country with respect to our own cur-

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[9] Mercantile National Bank at Dallas v. Franklin Life Insurance Company, 248 F. 2d 57 (5 Cir., 1957); United States v. Garland, 122 F. 2d 118, 136 A.L.R. 918 (4 Cir., 1941), cert. denied, 314 U.S. 685 (1941); Fidelity Mut. Life Ins. Co. v. Merchants' and Mechanics' Bank, 71 F. 2d 777 (5 Cir., 1934), cert. denied, 293 U.S. 593 (1934); Pacific States Life Ins. Co. v. Bryce, 67 F. 2d 710, 91 A.L.R. 1446 (10 Cir., 1933); Lipman v. Equitable Life Assur. Soc. of the United States, 58 F. 2d 15 (4 Cir., 1932); Varas v. Crown Life Insurance Company, 204 Pa. Super. 176, 203 A. 2d 505 (1964); Gerber v. Equitable Life Assur. Soc. of United States, 1 Ill. App. 2d 272, 117 N.E. 2d 393 (1954); Langley v. New York Life Insurance Co., 273 S.W. 2d 567 (Ky. App., 1954); Minning v. Prudential Ins. Co. of America, 88 Ohio App. 339, 95 N.E. 2d 269 (1950); Pack v. Progressive Life Ins. Co., 239 Mo. App. 1, 187 S.W. 2d 501 (1945); Mutual Life Ins. Co. v. Kaiser, 193 Miss. 581, 10 So. 2d 766 (1942); Fowler v. State Life Ins. Co., 160 So. 139 (La. App., 1935); Lauer v. Michigan Life Ins. Co., 268 Mich. 614, 256 N.W. 567 (1934); 45 C.J.S. Insurance § 460 b (1963). See also, Confederation Life Association v. Ugalde, supra note 1, dissenting opinion, 151 So. 2d 315 at 323; Magers v. National Life and Accident Insurance Company, 329 S.W. 2d 752 (Mo. App., 1959).

[10] Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. 1501. Also known as the Bretton Woods International Fund Agreement.

[11] Confederation Life Association v. Ugalde, supra Note 1.

rency and are not violative of United States policy. The Florida Courts are obligated by the International Monetary Fund Agreement to apply the cited Cuban laws to the contract here involved." [12]

Although it has been suggested that insurance contracts are not within the class of contracts intended to be governed by the Bretton Woods Agreement,[13] we are not concerned with that issue. The issue to be decided in this case is whether the decision in Ugalde is still binding in view of the subsequent withdrawal of the Republic of Cuba from the International Monetary Fund Agreement.[14]

We are of the opinion that the withdrawal of Cuba from the Fund Agreement creates a material distinction between the Ugalde case and the case here before us. Therefore, we hold that judgment in favor of the appellee is not precluded by Article VIII, Section 2(b), of the Bretton Woods Agreement. In support of this holding, we rely upon a similar decision in the United States Circuit Court of Appeals, Fifth Circuit,[15] wherein the opinion recites:

"When the Blanco case was before this Court on an interlocutory appeal it was urged by Pan-American that the rights of Blanco to payment in the United States became unenforceable by Cuban Law No. 858 requiring payments to Cuban nationals to be made in Cuba in pesos, and that this law is valid under the

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[12] Id., 164 So. 2d at 2.

[13] Paradise, Cuban Refugee Insureds and the Articles of Agreement of the International Monetary Fund, 18 U. Fla. L. Rev. 29 (1965).

[14] The Ugalde decision, supra note 1, was released on February 24, 1964. Cuba's withdrawal from the International Monetary Fund Agreement was effective April 2, 1964.

[15] Pan-American Life Insurance Company v. Blanco, 362 F. 2d 167 (5 Cir., 1966).

> Bretton Woods International Fund Agreement. The effect, if any, of the Agreement was not decided on the former appeal. 311 F. 2d 424, 427. Since the case was before us Cuba has withdrawn from the International Monetary Fund and is no longer a party to the Agreement. This being so, a judgment on the policies will not be precluded by the Agreement." [16]

It is settled that the laws of a nonmember nation are not given extraterritorial effect by the terms and conditions of the Bretton Woods Agreement.[17]

There remains for consideration appellant's contention that recovery should have been denied to the appellee because he failed to prove any breach of contract on the part of the insurer.

The foregoing contention would weigh heavily against appellee had he sought relief at law for breach of contract. But, the complaint in this cause was founded in equity. In finding for the appellee, the chancellor based his decision upon equitable principles, as is demonstrated by the order appealed which recites:

> ". . . Equity seeks to do justice and avoid injustice, and is not bound by strict common-law rules. A court of equity is a court of conscience; it seeks to do justice in equity between all parties; it seeks to strike a balance of convenience as between litigants; and it looks at the whole situation. It does not act unless justice and good conscience demand that relief should be granted, and acts only in accordance with conscience and good faith. It is particularly well-known that equity seeks to prevent unjust enrichment, and will

[16] Id. at 170.

[17] Stephen v. Zivnostenska Banka National Corporation, 140 N.Y.S. 2d 323 (Sup. Ct., 1955), aff'd, 286 App. Div. 999, 145 N.Y.S. 2d 310 (1955).

not permit one to be enriched unjustly at the expense of another."

* * *

"As was pointed out in the case of *Secombe* v. *Steele*, supra,[18] equity regards substance rather than form. The maxim, or its substantial equivalent, that [equity] regards substance rather than form has been frequently stated and applied. *Bruce's Juices* v. *King*, 61 So.2d 175 (Fla. 1952). . . ."

* * *

"In the instant case there is no doubt that the Plaintiff would have an absolute right to a meaningful recovery were if not for the revolution in Cuba. . . . [A]pplying the maxim that equity looks at the substance rather than the form of the transaction and since the primary purpose of this transaction is the payment of the cash surrender value of the policy after a period of twenty (20) years, and the provision of payment being made in Havana is merely for the convenience of the parties, there is no equitable reason why the Plaintiff should not recover."

The record on appeal indicates that the appellee has adequately met his burden of showing the non-existence of any genuine issue of any material fact.[19] We are of the opinion, then, that the chancellor was correct in awarding judgment to the appellee as a matter of law.

We have examined appellant's other contentions and find them to be without merit. Accordingly, on the basis of the foregoing, we affirm.

Affirmed.

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[18] Secombe v. Steele, 61 U.S. (20 How.) 94, 15 L. Ed. 833 (1858).

[19] Visingardi v. Tirone, Fla. 1966, 193 So. 2d 601; Holl v. Talcott, Fla. 1966, 191 So. 2d 40.

Not final until time expires to file rehearing petition and, if filed, determined.

IN THE

SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1968

Case No. 37,195

CONFEDERATION LIFE ASSOCIATION, a Canadian corporation, also known as LA CONFEDERACION DEL CANADA, *Petitioner*,

v.

MANUEL ANTONIO VEGA Y ARMINAN, *Respondent*.

Opinion filed May 29, 1968

Writ of Certiorari to the District Court of Appeal, Third District

Shutts & Bowen, Cotton Howell, Covington & Burling (Washington, D. C.), John G. Laylin (Washington, D. C.), William A. Dobrovir (Washington, D. C.) and George V. Allen, Jr. (Washington, D. C.), for Petitioner

Helliwell, Melrose & DeWolf, Thomas B. DeWolf and Michael G. Martin, for Respondent

PER CURIAM.

The District Court of Appeal, Third District, having certified to us that its decision in the case of Confederation Life Association v. Vega y Arminan, 207 So.2d 33, passes upon a question of great public interest, we have jurisdiction of the petition for certiorari herein pursuant to Section 4(2), Article V, State Constitution.

Our study of the case leads us to the conclusion that the decision of the District Court is correct and we adopt it as our answer to the certified question.

The writ of certiorari is discharged.

ROBERTS, ERVIN and ADAMS, JJ., and SPECTOR, District Court Judge, concur

CALDWELL, C.J., dissents

Office Supreme Court, U.S.
FILED
OCT 1968

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1968

No. 564

CONFEDERATION LIFE ASSOCIATION,
a Canadian Corporation,
Petitioner,

vs.

MANUEL ANTONIO VEGA y ARMINAN,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	2
ARGUMENT	6
CONCLUSION	17

TABLE OF AUTHORITIES

Case	Page
Auten v. Auten, 129 N.E. 2nd 99	11
Clay v. Sun Ins. Office, 377 U.S. 179	11, 12
Confederation Life Ass'n v. Ugalde, 164 So.2nd 1	13
Confederation Life Ass'n v. Arminan, 144 So.2nd 85	8
Delmonico v. State, 155 So.2nd 368	16
Imperial Life Ass. Co. v. Colmenares, 1967 Canada Law Reports, Supreme Court	8, 9, 10
Jacksonville v. Peninsular Land, 157 So. 661	16
Pan American Life Ins. Co. v. Blanco, 362 F.2d 167	12
Secombe v. Steele, 61 U.S. (20 How.) 833	14
U.S. v. Penn Mutual Life Ins. Co., 130 F.2nd 495	11
U.S. v. Won Kim Ark, 169 U.S. 655	8

OTHER AUTHORITIES

Se. 4, Declaration of Rights, *Fla. Const.*	8
§624.02210, *Fla. Stats.*	7
§624.0221, *Fla. Stats.*	7
Rule 3.14(c), Fla.App. Rules 32 *F.S.A.*	16
Rule 23 (f), Rules of Supreme Court of the U.S.	16
Bretton Woods International Fund Agreement	12

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1968

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CONFEDERATION LIFE ASSOCIATION,
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Petitioner,

vs.

MANUEL ANTONIO VEGA y ARMINAN,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida

BRIEF OF RESPONDENT

Respondent, MANUEL ANTONIO VEGA y ARMINAN, prays that the Court deny the Petition for Writ of Certiorari to review the judgment of the Supreme Court of Florida, opinion filed May 29, 1968.

JURISDICTION

The jurisdiction of this Court should not be invoked because of the failure of the Petitioner to assert a federal right in the lower court and because the case does not present a federal question.

STATEMENT OF THE CASE

Respondent, MANUEL ANTONIO VEGA y ARMINAN, was the plaintiff in the lower court and Petitioner, CONFEDERATION LIFE ASSOCIATION, was Defendant.

This case arose as an appeal of an Interlocutory Order and Opinion entered by the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, sitting in Chancery, which granted the Respondent's Motion for Summary Judgment on the issue of liability and denied the Petitioner's Motion for Summary Judgment (Page 1a to Page 11a of the Appendix of the Petitioner, which will hereinafter be referred to as: App. Pet.).

On or about February 14, 1928, Petitioner, by its duly authorized, agent, executed and delivered to the Respondent, in Havana, Cuba, its policy of insurance (No. 273,630), which was duly issued and executed by its officers in Toronto, Canada, *inter alia*, insuring the life of the Respondent. Moreover, the policy of insurance provided for a stipulated cash surrender value after the Respondent had paid the premiums for twenty years.

The policy contains, *inter alia*, these provisions:

> "All payments under this policy whether they be on the part of the Company or the insured, will be verified in money which is actually legal tender of the United States of America [App. Pet. 14a].

> It is not necessary for the assured or the beneficiary of this policy to utilize any person, firm or corporation to collect this insurance or to obtain some of the benefits indicated by the policy. Write directly to the Confederation of Canada or communicate with the authorized agent of the Company which has his residence nearest the place where you are and who is obligated to attend and facilitate for you any arrangement without any expense for you [App. Pet. 15a].
>
> No restriction obliges the insured under this policy regarding residence, travel or occupation, ... [App. Pet. 15a]."

The Respondent made yearly payments from February 14, 1928, the date of issuance of the policy, until February 14, 1947, making a total during this period of Twenty (20) yearly payments in the sum of $242.00 each. All of the premium payments were made in United States dollars in accordance with the policy provisions.

Around January 1959 a violent revolution took place in Cuba by which the lawful government of Cuba was deposed and an unlawful revolutionary government seized power and has, since that time, maintained power over Cuba as a *de facto* government. This revolutionary government of Cuba, since 1959, has dedicated itself to the doctrine of Communism and maintains over the Cuban people a tyrannical government headed by a ruthless Communistic dictator. This revolutionary government under-

took a systematic campaign to convert the Cuban people into a Communistic society by intimidation, coercion, arrest and imprisonment; effected reprisals against all persons who opposed the regime, and attempted to eliminate the policies and doctrines, both economic and political, which prevailed prior to the revolution.

Respondent, on or about September 2, 1960, departed Cuba and took up residence in the United States of America, in the city of Miami, Florida, and remained in Florida as a bona fide resident of the State of Florida. Moreover, Respondent is a permanent resident of the United States and a permanent resident of the State of Florida and has been granted permanent Immigration Registration No. A-12-447-101, on or about June 2, 1964, by the United States government (App. Pet. 3a).

On or about March 7, 1961, Respondent requested in Miami, Florida, the cash surrender value of the policy as of that date, according to the schedule appearing in the Policy. Petitioner refused to and continues to refuse to pay the cash surrender value of the Policy in U. S. Dollars.

Respondent, because of his opposition to the Communistic form of government, may not return to Cuba without fear for his life and safety (App. Pet. 2a).

Respondent proceeded, by action at law, against the Petitioner on the same policy in the Circuit Court in and for Dade County, Florida, being Case No. 61-L-1651, wherein a Final Order of Dismissal, without Prejudice, was entered, which said Dismissal left the Respondent without an adequate remedy at law. Respondent then

brought this suit in equity which gave rise to this Appeal. The Order and Opinion entered by the Chancellor is the basis of this Interlocutory appeal taken by the Petitioner.

On appeal, the District Court of Appeal of Florida, Third District, affirmed the Circuit Court's decision, with Opinion (App. Pet. 11a).

Petitioner filed in the District Court a Petition for Rehearing, which was granted, and in the alternative a Suggestion of Matter of Great Public Interest. On rehearing the District Court reaffirmed its decision and certified to the Supreme Court of Florida that the case passed on a question of great public interest. A Petition for Writ of Certiorari was granted March 12, 1968. Thereupon, the Supreme Court of Florida received briefs of the parties, heard oral argument and filed its Opinion of May 29, 1968 (App. Pet. 22a). Thereafter, Petitioner filed an extensive Petition for Rehearing, which was denied.

The record does not support the allegations of the Petitioner that the Petitioner maintains in Cuba the assets necessary to meet it obligations in Cuba. Additionally, the record does not support the statement that the Petitioner at all times stood ready to maintain the policies in effect while both parties await changes in the political and legal climate in Cuba.

Petitioner's quote, as set forth at Page 5 of the Petition, concerning the investments in Cuba was in the form of a letter not admissible in evidence, nor admitted into evidence, nor is it supported by the record.

THE WRIT SHOULD NOT BE GRANTED

There is no Federal question involved. The respondent made his payments in United States Dollars prior to the enactment of any of the Cuban Legal Tender Laws or Decrees. The policy, when sued upon, was fully paid up vesting the Respondent with all rights to the cash surrender value of the policy, as of that date, in United States Dollars. Florida courts are not obligated by the International Monetary Fund Agreement to apply the Cuban Monetary Control Laws to the controversy because Cuba is not a member of the International Monetary Fund Agreement. Respondent is a bona fide resident of the United States in the city of Miami, Florida, and accepted the continuing irrevocable offer of the Petitioner to pay the cash surrender value of the policy while he was located in Florida and was a resident thereof. The policy application was sent to the home office of the insurance company in Toronto, Canada, from where the Policy was issued and the signatures of its corporate officers affixed to the policy. Moreover, the policy stipulates that payment is to be verified in money which is actually legal tender of the United States of America, and the Policy, by its terms, contemplates that the insured may change his residence, or travel, and make application for payment of the cash surrender value wherever he is, by applying to the home office of the company or to the agent nearest his residence at the time demand for the cash surrender value is made. Most importantly, the Respondent cannot return to Havana, Cuba, to receive payment for fear of his life and safety as a result of the political situation in Cuba.

The law governing this suit is not Cuban law. The District Court of Appeal of Florida held that the cash surrender value clause constitutes a continuing irrevocable offer by the company which matures into a contractual obligation upon its acceptance by the insured, that the acceptance by the insured was in Florida, and, therefore, Florida law governed the contract. This holding does not impliedly mean that the original contract was a Cuban contract or to be governed by Cuban law. In fact, the District Court specifically stated in its Opinion, filed January 23, 1968, (App. Pet. 11a):

> "However this may be, we are unwilling to join Appellant [Petitioner] in its contention that the situs of the contract in this case is the Republic of Cuba."

The most significant contacts are with the State of Florida; Respondent is a bona fide resident of the State of Florida as is the Petitioner, §624.0221, §624.02210, *Fla. Stats.*, qualify the Petitioner to do business in the State of Florida, and which the Petitioner is doing.

Equally important is the fact that the provisions of the policy dilute and qualify the policy provision concerning payment in Cuba. Of great significance, however, is the fact that nowhere in the policy may be found words contradictory to the provision that all payments under the policy must be in the legal tender of the United States, indicating thereby that the intent of the parties was clearly that the governing law of the policy would be that of the United States because this is the only law which, with certainty, could provide for payment in the United States Dollars as required by the policy.

Common sense dictates that the meeting of the minds of a Canadian insurance company doing business in Cuba, and an insured executing an insurance policy providing that all payments under the contract shall be verified in the legal tender of the United States, the Company having a corporate residence in the same country as the currency specified, would be that the parties intended payment to be in Dollars and be governed by United States' law.

Respondent has expressed by word and deed his intention of continuing his residence in Forida. He has been admitted as a permanent resident of the United States and is entitled to full and equal protection of the law. *United States* v. *Wong Kim Ark*, 169 U.S. 655 (1897); Sec. 4, Declaration of Rights, *Florida Constitution.*

Because the Respondent is a resident of Florida, he is entitled to bring suit on the policy in Florida and may obtain jurisdiction over the Petitioner. *Confederation Life* v. *Arminan*, 144 So. 2nd 805 (Fla. Sup. Ct. 1962).

VIOLATION OF INTERNATIONAL LAW

Petitioner fails in the argument of a violation of International Law and interference in the conduct of foreign relations. Moreover, Petitioner fails to mention the case of *Imperial Life Assurance Company of Canada* v. *Segundo Casteleiro y Colmenares*, 1967 Canada Law Reports, Judgment pronounced May 23, 1967, by the Supreme Court of Canada, where the sole question was whether the proper law of the contracts of life insurance was the law of Ontario or the law of Cuba. The insurance policies in *Imperial Life* were issued through the company's branch office in

Havana, Cuba, in 1942 and in 1947 at a time when the insured was a resident of, and domiciled in Cuba. The parties agreed that if the proper law of the contracts was that of Ontario, the insured was entitled to succeed, but if the law of Cuba applied, the payment of cash surrender value in Dollars to a person resident in the United States (as was the Respondent in 1961 when he surrendered the policy) would be an offense contrary to the Foreign Exchange Contraband Law of Cuba. The two policies in *Imperial Life* were identical in terms and both were written in Spanish and delivered by Imperial Life's Cuban agent to the insured who was then a Cuban national and who had made application in Cuba. Before delivery the policies were duly authenticated before a notary in accordance with the laws of Cuba. It was contended on behalf of the insurance company, on the basis of these facts, that the contracts were made in Cuba and were governed by the law of that country.

The Canadian Supreme Court noted that it was apparent that although the policies did not become effective until certain conditions were fulfilled, which conditions occurred in Cuba, these conditions were in themselves a part of the, "entire contract between the parties"—which, in the court's opinion, was concluded when the policies were mailed in Toronto. The Court stated:

> "The fact that the parties agreed that the policies were not to become effective until the conditions were fulfilled in Cuba did not alter the place where that agreement was made. It has long been recognized that when contracts are to be concluded by post, the place of mailing the acceptance is to be treated as the place where the contracts were made."

The Court further stated:

> "It now appears to have been accepted by the highest courts in England that the problem of determining the proper law of the contract is to be solved by considering the contract as a whole in light of all the circumstances which surround it and applying the law with which it appears to have the closest and most substantial connection.
>
> This test was adopted by privy council in... with Lord Simmonds saying... '[T]he substance of the obligation must be determined by the proper law of the contract, i.e., the system of law by reference to which the contract was made or that with which the transaction had its close and most real connection.'."

The Court, in *Imperial Life*, further stated:

> "While it is clear that all relevant circumstances surrounding the making of a contract are to be given due weight in determining the locality with which it is most closely associated, I am of the opinion that in the present case the fact that both the applications and the policy were prepared in Ontario in a common, standard form which complied with the law of that Province, is to be regarded as proponderating importance in determining the law governing the contracts.
>
> I think it is to be a reasonable inference that a person applying for insurance on a form prepared at the head office of an Ontario company would anticipate that the policies which he was to receive would be governed by the law of that Province, and I think that the form of the policies

> which were issued in the present case evidences the fact that the insurer intended to be governed by that law.
>
> For these reasons, as well as for those which have been so fully stated in the reasons for judgment of Mr. Justice MacKay, I am of the opinion that the proper law of these contracts is the law of Ontario."

When the contacts or factors are analyzed which most closely align the parties to a particular area. it is easily apparent that Florida is that area. The Petitioner has posted a cash reserve and proved financial responsibility so as to conduct business in Florida. Through this action alone, the Petitioner has shown its willingness to accept the benefits and burdens of its Florida contacts. *accord, Auten* v. *Auten*, 308 N.Y. 155, 124 N.E. 2nd 99 (Ct. App. N.Y. 1954).

Even if assumed, *arguendo*, that the policy here was governed by Cuban law, the election of the Respondent, while in Florida, to receive the cash surrender value of the policy option constitutes the completion of the contract. The cash surrender option is a continuous, irrevocable offer which can only materialize into a contract by its acceptance, which the Respondent has done. *U. S.* v. *Penn Mutual Life Insurance Co.*, 130 F.2d 495 (3rd Cir. 1942).

There has been no violation of international law, nor is there an interference in the conduct of foreign relations or a deprivation of property without due process of law when the forum properly determines the governing law. *Clay v. Sun Ins. Office*, 377 U.S. 179, 84 S.Ct. 1197, 12 L.Ed. 229 (1964). If the forum has a more than casual connection with the controversy, there is no inhibition to apply the local law consistent with due process to the matter.

> "Insurance companies, like other contractors, do not confine their contractual activities and obligations within the state boundaries. They sell to customers who are promised protection in states far away from the place where the contract is made. In this very case the policy was sold to Clay with the knowledge that he could take his property anywhere in the world he saw fit without losing the protection of insurance. . . . The contract did not even attempt to provide that the law of Illinois would govern when suits were filed anywhere else in the country. Shortly after the contract was made, Clay moved to Florida and there he lived for several years. His insured property was there all that time. The Company knew this fact. Particularly since the Company was licensed to do business in Florida it must have known it might have been sued there. . . ." *Clay* v. *Ins. Office*, *supra*, at p. 182.

Therefore, the previous holding that it was not compatible with due process for Florida to apply its five-year Statute of Limitations to the insurance policy involved in *Clay*, was error. Florida had ample contacts with the transaction.

There is no question that the effect, if any, of the Bretton Woods International Fund Agreement on this case is vitiated by Cuba's subsequent withdrawal, *Pan American Life Ins. Co.* v. *Blanco*, 362 F.2d 167 (5th Cir. 1966).

Petitioner argues it has been deprived of defenses vested under the law of Cuba which violates the Constitutions of Florida and the United States. Petitioner, however, has not shown, nor asserted any right or defense given by the law of Cuba to the payment of its obligations. The contract is payable, and the Petitioner admits its obligations thereunder. Petitioner has not shown it has not

been unjustly enriched by the premium payments made by the Respondent in United States Dollars for a period of 20 years. Petitioner does not assert a substantive defense to payment of the policy by virtue of the laws of Cuba, e.g., the Cuban Statute of Limitations, or any other substantive defense.

The equitable considerations implicit in this case were not involved in *Confederation Life Ass'n.* v. *Ugalde*, 164 So.2nd 1 (Fla. 1964), nor in any of the other decisions referred to by the Petitioner.

Petitioner states it has maintained its investments in Cuba to cover its Cuban obligations, and which remain subject to Cuban law in regard to these policies.

Moreover, Petitioner states that:

> "[P]etitioner is a mutual company with a great many American policyholders whose annual insurance cost is increased whenever a court awards any policyholder more than his policy insures him against. Petitioner's American policyholders will be among those injured and Petitioner is visited with a double injury through application of the Cuban penal laws which the decisions here would require Petitioner to violate."

There is nothing in the record supporting the matters asserted. For a court to indulge in such an assumption would be without precedent. The Court more reasonably should assume that Petitioner removed all its assets from Cuba immediately, including the U.S. Dollars paid by the Respondent for 20 years, prior to the enactment of the Cuban monetary restrictions. However, there is absolutely no support for either proposition in the record.

DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS

Petitioner places a great emphasis upon the clause in the policy providing that payment is to be made in Havana, Cuba, and argues that international law so requires. International law does not consider the place of payment as determinative of the choice of law to be applied to a contract. The only portion of the insurance contract with which the Respondent has not literally complied is the requirement that payment be made to him in Havana, Cuba, a provision which is ambiguous when read with, and in the light of the entire policy, including the provisions which allow making payments elsewhere, the lack of restriction on the place of residence of the insured, or on travel by the insured and which provide that the insured may merely write to the home office of the Petitioner in Toronto, Canada, for payment of the policy.

Implicit in every contract is that equitable considerations pervade the entire contract. Equity will not allow mere form to defeat the substance of an agreement. *Secombe* v. *Steele*, 61 U.S. (20 How.) 833, (1858), at Page 836, states:

> "At law, if there is an express agreement for the payment of the purchase money, and the delivery of the conveyance of the land by a particular day, and at a particular place, the parties will be bound by it, and time will be of the essence of the contract . . . Time may be made of the essence

> of the contract by express stipulation, or it may become essential by considerations arising from the nature of the property, or the character of the interest bargained. And the principle of a court of equity does not depend upon considerations collateral to the contract merely, nor on the conduct of the parties subsequently, showing that time was not of the essence of the contract in the particular case.
>
> But it must affirmatively appear that the parties regarded time or place as an essential element in their agreement, or a court of equity will not so regard it.
>
> [C]ourts of equity make a distinction in all cases between that which is a matter of substance and that which is a matter of form; and if it find that, by insisting on form, the substance will be defeated, it holds it to be inequitable to allow a person to insist upon such form, and thereby defeat the substance."

There has been no enlargement of the obligations of the contract, nor have the Florida courts attempted to enlarge the Petitioner's obligations. The Florida courts have given effect to the intention of the parties, which is shown by the facts. Moreover, the statement that there is bias manifested against the Petitioner, a Canadian company, cannot be supported by the record, and does violence to the holding in *Imperial Life, supra.*

The Petition does not comply with Rule 23(f) of the Rules of the Supreme Court of the United States. It does not specify at what stage in the proceedings in the Court of first instance, and in the Appellate Court, nor the manner in which the Federal questions sought to be reviewed were raised, nor the method and the way in which they were passed upon by the Court with such pertinent quotations and specific portions of the record and where the matters appear as would show that the Federal question was timely and properly raised. The fact is that the first time a Federal question was raised was in the Petition for Rehearing which was denied by the Supreme Court of Florida. The rule is well settled that no ground or position not taken on the hearing can be assumed in a Petition for Rehearing. *Jacksonville* v. *Peninsular Land*, 27 Fla. 1, 157, 9 So. 661 (1891). Initial presentation of matters on a Petition for Rehearing is improper under Florida law. *Delmonico* v. *State*, 155 So.2d 368 (Fla. 1963). Rule 3.14 (c) Fla. Appellate Rules, 32 *F.S.A.*, provides that the Petition for Rehearing shall not be considered a part of the record in the cause unless so ordered by the Court, or unless rehearing is granted. In this case no rehearing was granted, nor was the Petition for Rehearing ordered to be a part of the record, and as such does not become a part of the record.

CONCLUSION

Respondent respectfully submits that the Court is not required by treaty, general principles of international law or the applicable law to apply the Cuban monetary laws and decrees to the insurance contract herein involved. The defense of place of payment is not a bar to recovery under equitable principles. There exists no federal question upon which this Court should pass or should review. The lower Court's granting of Summary Judgment as to liability was eminently correct.

Respectfully submitted,

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No. 564

Supreme Court of the United States

OCTOBER TERM, 1968

CONFEDERATION LIFE ASSOCIATION, a Canadian corporation, *Petitioner*,

v.

MANUEL ANTONIO VEGA Y ARMINAN, *Respondent*.

REPLY BRIEF FOR PETITIONER

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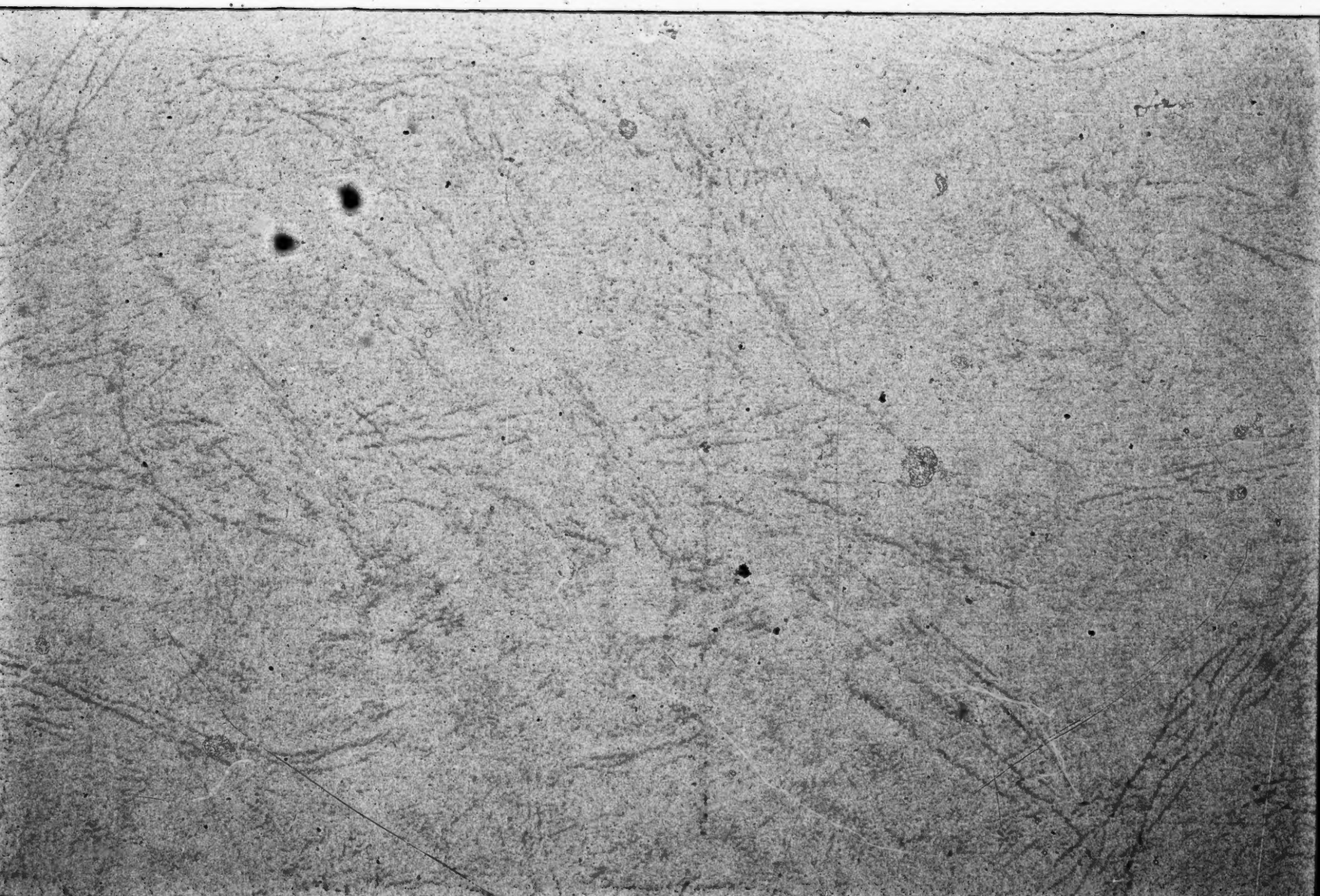
October 29, 1968



Supreme Court of the United States

OCTOBER TERM, 1968

No. 564

CONFEDERATION LIFE ASSOCIATION, a Canadian corporation, *Petitioner,*

v.

MANUEL ANTONIO VEGA Y ARMINAN, *Respondent.*

REPLY BRIEF FOR RETITIONER

I

The point of overriding importance in this case is that the transaction involved was and remains clearly Cuban in every significant respect. It is clearly governed by Cuban law.

Respondent was a citizen and resident of Cuba when the policy was issued and delivered to him in Cuba, as he was when he applied for the policy; and he does not claim that he had previously held any other citizen-

ship or had any other residence. The policy was issued by petitioner's Havana branch, was written in the Spanish language, and it is conceded by the Florida courts that the contractual relationship which the policy embodied was "entered into in Cuba . . . ." (Pet., App. 16a.) The policy was expressly payable *only* in Havana, Cuba. After the policy was issued, respondent remained a citizen and resident of Cuba for more than 30 years and made each of his premium payments in Cuba, to petitioner's Havana branch.

Although the policy as originally written was made payable in dollars, a point stressed by respondent (Br. in Opp., pp. 2, 6-8), this fact in no sense undercuts the policy's consistent Cuban identification. Respondent did in fact request his policy to be written in one of the two Cuban domestic currencies then recognized by the laws of Cuba as legal tender in Cuba. One of these Cuban domestic currencies, and the one chosen by respondent, was the United States dollar, which at that time enjoyed this special and unusual local status. (See Pet., pp. 3-5.)*

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* Even the Florida courts did not deny, as respondent sometimes does (Br. in Opp., pp. 7-8, 11), that the basic contract is governed by Cuban law. (Pet., App. 16a-17a. See also the Florida District Court of Appeal's previous decision in Confederation Life Ass'n v. Ugalde, 151 So. 2d 315, 318 (Dist. Ct. App. 1963), *aff'd*, 164 So. 2d 1 (Fla. 1964), *cert. denied*, 379 U.S. 915.) In their decisions below the Florida courts have now purported to regard respondent's election in Florida to demand payment there of the policy's cash surrender value as an "acceptance" of an outstanding "offer" by petitioner, with the result that a new contract was deemed to have been "made" in Florida. (Pet., App. 17a-18a.) This Court long ago rejected an identical argument as a purported basis for application of forum law to an insurance transaction not properly subject to forum law. Aetna Life Ins. Co. v. Dunken, 266 U.S. 389, 399-400. "[A] state cannot

II

The present "Communistic" government of Cuba, which draws such opprobrium in respondent's brief (*e.g.*, Br. in Opp., pp. 3-4), came to power in 1959. Long before that, in 1951, laws duly enacted by an elected government of Cuba provided that the United States dollar "shall cease to be legal tender and have debt redeeming force in the territory of the Nation. . . ." Under these laws all outstanding dollar obligations payable in Cuba ("all obligations contracted and payable in the national territory") became payable after June 30, 1951 in Cuban pesos at the rate of one peso to the dollar ("through the delivery of national currency in the same amounts as those previously expressed in United States dollars"). (R. 5, pp. 46-47, 50-51.) Cuban exchange controls enacted after 1959 have made payment of respondent's policy in Cuba mandatory and have made it a criminal offense for either party to attempt to discharge an obligation under the policy outside Cuba.

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obtain control over conduct not within its jurisdiction to prescribe by the simple device of inventing a choice of law rule to be applied in the particular case for the purpose of giving effect to a rule of its own law designed to govern conduct." Restatement, *Foreign Relations Law of the United States*, § 19, *Comment d* (Proposed Official Draft, 1962).

This Court's decision in Clay v. Sun Ins. Office, Ltd., 377 U.S. 179, relied upon by respondent (Br. in Opp., pp. 11-12), is not in point. That case involved the question of whether the forum could properly apply a forum statute of limitations in a suit based on property loss which occurred in the forum state. There was no claim that the policy, titled a "Personal Property Floater Policy (World Wide)", did not cover property loss occurring in the forum state. Since property in the forum state was clearly covered, and since loss did in fact occur in the forum state, application of the forum state's statute of limitations was obviously justified.

In large part respondent's brief consists of argument that the contractual specification of the medium of currency in which payments were to be made justified the courts below in ignoring the effects of Cuban law upon the parties' contractual relationship. But this argument cannot survive the fact that the transaction was in every significant sense a Cuban transaction, that the contract between the parties was not only concededly "entered into in Cuba" but was expressly performable *only* in Cuba, and that the Cuban laws both authorizing and requiring payment to be made in Cuban pesos were clearly a proper exercise of an inherent power possessed by every sovereign government. This is so clearly recognized in our own law as to be beyond dispute. *Guaranty Trust Co.* v. *Henwood,* 307 U.S. 247, 258-259; *Norman* v. *Baltimore & Ohio R.R. Co.,* 294 U.S. 240, 302, 307-308; *Juilliard* v. *Greenman,* 110 U.S. 421, 446-450; *Legal Tender Cases, Knox* v. *Lee* and *Parker* v. *Davis,* 79 U.S. (12 Wall.) 457, 548-549.*

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* Thus, almost a century ago, in the *Legal Tender Cases,* this Court said: "Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency . . . and the obligations of the parties are, therefore, assumed with reference to that power." 79 U.S. (12 Wall.) at 549. It is "a power universally understood to belong to sovereignty . . . ." Juilliard v. Greenman, *supra* at 447.

The same power was exercised again by Congress in the Gold Clause Resolution in 1933, and was held by this Court to apply to all "domestic obligations, controlled by and to be interpreted under the law of the United States." Guaranty Trust Co. v. Henwood, *supra* at 258. There, moreover, an express contractual provision giving the creditor an option to demand payment outside the United States, in designated foreign currencies, was held ineffective to circumvent Congress' power to require that the obligation be discharged by payment of United States legal tender.

III

There is nothing "ambiguous" about the policy's place of payment provision, as respondent suggests. (Br. in Opp., p. 14.) That provision could hardly be more clear. It states unequivocally:

> "All payments within the policy, whether they be on the part of the company or the insured, will be effected in the City of Havana, Republic of Cuba, but the insured may, with the consent of the Company, make his payments elsewhere."

Neither the fact that under the terms of the original policy the company was able to "allow" the making of premium payments outside Cuba (Br. in Opp., p. 14), nor the fact that the insured was invited to seek assistance from the company at its head office or wherever it had an authorized agent (*id.*, pp. 3, 6, 14), means that the company is required to pay the insured wherever he requests payment or makes such a contact; certainly those provisions do not detract from the policy provision explicitly stating that payments of benefits would be made only in Cuba; and Cuban law now positively *forbids* the company from making any payment outside Cuba.

The fact that the policy places no restrictions on residence and travel by the insured (*ibid.*) has to do simply with the extent to which the company was willing to assume health and other hazards to which the insured's life might be subjected without an increase in premium; hence, the same clause similarly placed no restriction on the insured's occupation.

IV

The fact that the Supreme Court of Canada did not apply Cuban law in *Imperial Life Assur. Co.* v. *Casteleiro,* [1967] S.C.R. 443 (see Br. in Opp., pp. 8-11), is not dispositive of any of the issues raised in this petition. In *Casteleiro* the policy did not provide for payment in Cuba but expressly provided instead that payment would be made "by bank draft drawn on New York." The opinion does not indicate whether the company maintained assets in Cuba to cover policies thus made payable by bank draft on New York or whether the company even regarded such policies as Cuban transactions to the extent that their servicing required the continued operation of a Cuban branch. The Supreme Court of Canada refused to infer any implicit contractual requirement that the cash surrender value be paid only in Cuba and in fact construed other provisions of Mr. Casteleiro's policy to warrant an assumption by him that payments under the policy would be made in Toronto, where the company had its head office.

The *Casteleiro* decision is in fact directly in conflict with what must be respondent's position in this case. In *Casteleiro* the Supreme Court of Canada ruled that the contract was governed by Ontario law because it was "made" in Toronto. In this case the Florida courts have ruled that the contract was "entered into in Cuba", and have conceded *arguendo* that Cuban law is accordingly to be deemed the governing law of the original contract. (Pet., App. 16a-17a.) The theory advanced by the Florida courts here, that respondent's demand for the cash surrender value of the contract in Florida gave rise to a new contract governed by

Florida law, was summarily rejected by the Supreme Court of Canada in *Casteleiro,* as unprecedented and unsound.*

V

Respondent asserts that no federal question is involved.** But respondent's brief is so replete with the kind of foreign policy arguments that induced the Florida courts to refuse to apply Cuban law, including the Cuban legal tender law of 1951, as to clearly demonstrate the validity of petitioner's contentions that the Florida courts have based their action on reasons that are pertinent only to the conduct of foreign relations by the Executive Branch of the United States Government. Thus, respondent reiterates to this Court its urgings before the Florida courts that Cuban law is not to be applied because the Cuban government is "unlawful", "revolutionary", "*de facto*", "dedicated . . . to the doctrine of Communism", "tyrannical", "headed by a ruthless Communistic dictator", and given to "intimidation, coercion, arrest and imprisonment . . . ." (Br. in Opp., pp. 3-4.)

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* See also footnote, p. 2, *supra.*

** Respondent's later claim that the petition fails to satisfy Rule 23(f) of the rules of this Court (Br. in Opp., p. 16) cannot be sustained. The petition expressly states that petitioner's federal and international law arguments were raised at each stage in the lower courts' proceedings and gives citations to the record. (Pet., pp. 6-7.) Moreover, petitioner raised both the federal question and the question of international law when it moved for dismissal in the trial court on the authority of Confederation Life Ass'n v. Ugalde, *supra.* In that case the Florida Supreme Court and the District Court of Appeal specifically recognized that failure to apply Cuban law would involve the Florida courts in violations of federal constitutional law and international law.

The fact that Cuba is now in the hands of such a government has obviously worked a serious injury upon respondent, and upon other Cuban citizens who have similarly been forced to emigrate. But petitioner has suffered an injury that is no less serious. It is forbidden by Cuban law to remove any of its assets from Cuba, assets that were invested there and are held there for the purpose of meeting obligations under its Cuban policies, including this policy.* Petitioner is prohibited by Cuban law from making any payment outside Cuba on its Cuban policies, including this policy; and, if it does so, it is subject to severe penalties in Cuba, including intervention, which could amount to a confiscation of all of its assets in Cuba. (R. 5, pp. 49-51.) To require petitioner to pay this policy, and other such policies related solely to its Cuban branch operations, would not right any of the wrongs that have been perpetrated by the Castro regime in Cuba. Such a result would simply require petitioner to bear respondent's injury as well as its own. While respondent has been able to extricate himself personally from the power of the present Cuban government, petitioner in the nature of things has been unable to similarly protect itself.

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* Respondent questions the state of the record on this point (Br. in Opp., p. 5), but respondent forgets that the trial court below entered summary judgment for him. Even if petitioner had made no affirmative factual showing of any kind, it was *respondent's* duty to introduce evidence to support *his* repeated assertion that petitioner stands to be unjustly enriched by its refusal to make payment outside Cuba. The record is utterly barren of any support for such an assertion. The only evidence in the record is the sworn affidavit of an officer of petitioner indicating that petitioner was and remains fully invested in Cuba. (R. 5, pp. 55-56.)

VI

The complex of legal problems that have attended the advent of Castro in Cuba cannot be solved by treating petitioner as though it were an insurer against restrictions on the international movement of capital funds. This policy was manifestly not intended to be insurance against that kind of risk. Petitioner and respondent must both await the amelioration of conditions in Cuba. Until that occurs, petitioner's obligation is to make payments called for by the policy in Cuba in accordance with controlling Cuban law.

Moreover, to treat a policy of this sort as though it included insurance against any loss to an insured caused by restrictions on convertibility and capital movement, simply because the insurer is also subject to suit in nations less subject to currency inflation than the nation in which the policy is issued and expressly made payable, would not only be unfair to companies writing insurance on an international scale, it would operate as the strongest possible deterrent to the making of local capital investments by foreign insurance companies in the very nations that are most in need of foreign investment.

Conclusion

For the foregoing reasons, and for the reasons stated in the petition, it is respectfully submitted that the writ should be granted. In addition, because the petition raises questions that impinge critically upon the conduct of foreign relations by the Executive Branch, and because the petition raises a grave question of violation of international law by the United States, it is respectfully suggested that the Solicitor General

of the United States be requested to provide the Court with a memorandum expressing the views of the United States.

Respectfully submitted,

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